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Cause No. PD-1123-19

In the Court of Criminal Appeals
for
The State of Texas

Ex parte Charles Barton

Arising from Cause No. 02-17-00188-CR
In the Second Court of Appeals in
Fort Worth, Texas

Respondent's Brief on the Merits

Tobias Xavier Lopez
SBN 24089233
1319 Ballinger Street
Fort Worth, Texas 76102
817.335.0200
Lead Counsel for
Respondent

Lane A. Haygood
SBN 24066670
lane@haygoodlawfirm.com
522 North Grant Avenue
Odessa, Texas 79761
432.337.8514

Mark W. Bennett
SBN 00792970
mb@ivi3.com
917 Franklin Street
Fourth Floor
Houston, Texas 77002
713.224.1747

Oral Argument is Requested

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Issues Presented

Presented to this Court in this case are the issues a) whether section 42.07(a)(7) of the Texas Penal Code is unconstitutional because it is vague; and b) whether section 42.07(a)(7) is unconstitutional because it is overbroad.

Summary of the Argument

Section 42.07(a)(7) is void for vagueness, and is facially overbroad.

Argument

The State, in the last pages of its brief, reveals a staggering and dangerous fundamental misunderstanding of the right of free expression in the United States of America:

> Whatever protected speech that could be improperly limited by a properly construed statute must be dwarfed by the sheer volume of stupid, needlessly, and intentionally hateful words exchanged by those who live on social media, but there is no way to prove that.[1]

The State contrasts "protected speech" with "stupid, needlessly, and intentionally hateful words." But neither stupidity, needlessness,[2] nor

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[1] State's Brief 39.

[2] "Wholly neutral futilities come under the protection of free speech as fully as do Keats' poems or Donne's sermons." *Cohen v. California*, 403 U.S. 15, 25 (1971).

"hatefulness"[3] has ever been sufficient to remove speech from the First Amendment's aegis.

The protection of speech is not measured by whether speech is intelligent, necessary, and well-intentioned, but only on whether it falls within or outside narrow categories of unprotected speech: "From 1791 to the present … the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations."[4] *United States v. Stevens* teaches us that "stupid, needlessly, and intentionally hateful words" are, with expressive conduct that "invades the substantial privacy interests of another (the victim) in an essentially intolerable manner,"[5] protected speech as long as they do not fall into a *recognized category of historically unprotected speech*.

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[3] *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 270-71 (1964) (free speech "may well include vehement, caustic, and sometimes unpleasantly sharp attacks" on subjects); *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (speech that demeans on the basis of race, ethnicity, gender, religion, age, disability or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate"); *accord United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting).

[4] *United States v. Stevens*, 559 U.S. 460, 468 (2010) (cleaned up).

[5] Cf. *Scott v. State*, 322 S.W.3d 662, 670 (Tex. Crim. App. 2010).

The statute is unconstitutional because it is vague.

Free-speech vagueness is different from due-process vagueness.

While the State is correct that vagueness is a concept arising from the Due Process Clause, vagueness doctrine is different enough in the context of speech-restricting statutes than in the context of other statutes that they are effectively two separate doctrines.

Outside the context of speech,

1. "[A] person of ordinary intelligence must be given a reasonable opportunity to know what is prohibited";[6] and
2. "[T]he law must establish determinate guidelines for law enforcement."[7]

"When a statute is capable of reaching First Amendment freedoms," however,

> the doctrine of vagueness demands a greater degree of specificity than in other contexts. Greater specificity is required to preserve adequately the right of free expression because uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked. Moreover, when a

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[6] *Long v. State*, 931 S.W.2d 285, 287 (Tex. Crim. App. 1996).

[7] *Id.* "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972).

> vagueness challenge involves First Amendment considerations, a criminal law may be held facially invalid even though it may not be unconstitutional as applied to the defendant's conduct.[8]

In short, "where First Amendment freedoms are implicated,"

> 3. "[T]he law must be sufficiently definite to avoid chilling protected expression."[9]

This third vagueness test is unique to speech cases. First Amendment vagueness scrutiny thus grows out of both due-process concerns and the quintessential First Amendment concern about chilling expression. While First Amendment vagueness scrutiny encompasses Fifth Amendment vagueness scrutiny, it is not the same thing.

To satisfy vagueness scrutiny section 42.07(a)(7), which restricts "communications,"[10] must satisfy each of free-speech vagueness scrutiny's three tests. The statute fails that scrutiny.

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[8] *Long v. State*, 931 S.W.2d 285, 287–88 (Tex. Crim. App. 1996) (cleaned up).

[9] *Long v. State*, 931 S.W.2d 285, 287 (Tex. Crim. App. 1996).

[10] Tex. Penal Code § 42.07.

Section 42.07(a)(7) is vague because "harass," "annoy," "alarm," "abuse," "torment," "embarrass," and "offend" are all inherently vague.

What is reasonably likely to annoy, alarm, abuse, torment, embarrass, or offend one person will have no effect on another. These terms are, as the court below wrote, "susceptible to uncertainties of meaning."[11]

That all of these terms are inherently vague is illustrated by the State's brief, which from its very first sentence throughout uses "harass" to do the work of "harass, annoy, alarm, abuse, torment, embarrass, or offend."

A quick check of one's own feelings reveals that a human being can feel annoyed, alarmed, embarrassed, or offended—and possibly even abused or tormented—without feeling harassed. If that check didn't suffice, the dictionary would confirm it.

That the State attempts to make "harass" do the work of all of these verbs is a tacit admission that there is no way to know which of these unpleasant but common emotional states some particular speech is

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[11] *Ex parte Barton*, 586 S.W.3d 573, 582 (Tex. App.—Fort Worth 2019) ("Opinion Below").

reasonably likely to evoke: is poking fun at a public official on Twitter reasonably likely to *annoy* him? to *embarrass* him? to *offend* him?[12]

The statute's reliance on these inherently vague emotional states means it violates all three Rules of First Amendment Vagueness:

1. A person of ordinary intelligence cannot know what is forbidden;
2. There are no determinate guidelines for law enforcement;[13] and
3. The law is not sufficiently definite to avoid chilling protected expression.

Section 42.07(a)(7) is vague because police and prosecutors cannot read minds.

To pass vagueness scrutiny a restriction on speech must be "sufficiently definite to avoid chilling protected expression."[14]

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[12] If I intend to *embarrass* him, but miss the mark and my speech is reasonably likely to *annoy* him, I have violated the statute.

[13] For example: *Is the complainant's assertion that he was embarrassed sufficient to prove that the speech was reasonably likely to embarrass him? How badly must the complainant have been annoyed—is mild annoyance enough? What if the complainant is one of those internet denizens who derives her life's meaning from being offended? Must the speech be reasonably likely to alarm the complainant, or an ordinary person?* The statute does not contain an ordinary-person element but, as the State notes at page 25 of its brief, this Court's own opinions have differed on the last question.

[14] *Long v. State*, 931 S.W.2d 285, 287 (Tex. Crim. App. 1996). "[T]he Court has viewed the importation of 'chill' as *itself* a violation of the First Amendment." *Dickerson v. United States*, 530 U.S. 428, 459 (2000) (Scalia, J., dissenting).

This is a matter of providing "breathing space" for First Amendment freedoms.[15] "Breathing space" means, for example, that "in public debate we must tolerate insulting, and even outrageous, speech."[16] We protect speech, including that which might be outside of the First Amendment's political core, in order to ensure that "archetypical political speech" is not chilled.[17] A test focused on the speaker's intent provides no breathing space to First Amendment freedoms.[18]

Expression is chilled not only by the threat of *conviction* (because a jury might find that the defendant intended to harass, annoy, alarm, abuse, torment, or embarrass) but also by the threat of *arrest* (because a police officer might think the defendant intended to harass, annoy, alarm, abuse, torment, or embarrass) and the threat of prosecution (because a prosecutor might think the defendant intended to harass, annoy, alarm, abuse, torment, or embarrass).

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[15] *Nat'l Ass'n for Advancement of Colored People v. Button*, 371 U.S. 415, 433 (1963).

[16] *Boos v. Barry,* 485 U.S. 312, 322 (1988) (cleaned up). Section 42.07(a)(7) does not limit itself to the private realm. It would restrict the Facebook post or the tweet as well as the call to the home telephone.

[17] *Citizens United v. Fed. Election Com'n*, 558 U.S. 310, 329 (2010).

[18] *Fed. Election Com'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 469 (2007).

Even assuming that *a jury* can reliably read a speaker's mind—an assumption built into any statute that restricts non-speech conduct based on its intent—whether a speaker will be arrested or prosecuted for his speech depends not on a *jury's* mindreading, but on a police officer's and a prosecutor's.

While it may be acceptable to differentiate restricted non-speech conduct from unrestricted non-speech conduct based on its intent,[19] the policy against chilling speech and in favor of breathing space for expression calls for a different result when the conduct that is restricted is speech.

"Specifying an intent element does not save § 42.07 from vagueness because the conduct which must be motivated by intent, as well as the standard by which that conduct is to be assessed, remain vague."[20]

A chilling effect on speech exists where persons of reasonable judgment cannot determine whether their speech will be perceived as intended to annoy, alarm, abuse, harass, torment, or embarrass. To leave such a decision to law enforcement runs afoul of the rule of *Grayned v.*

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[19] *Screws v. United States*, 325 U.S. 91 (1945).

[20] *Kramer v. Price*, 712 F.2d 174, 178 (5th Cir. 1983), on reh'g, 723 F.2d 1164 (5th Cir. 1984).

City of Rockford that it is impermissible to delegate basic policy matters to "policemen, judges, and juries for resolution on an ad hoc or subjective basis."[21]

The crux of this challenge is not that there are close cases. It is that the decision point for close cases rests not with the trier of fact but with the constable charged with enforcing the law. People are messy. We are socially awkward. Sometimes we embarrass or annoy others without meaning to. Often our intentions are misinterpreted. Just as "[n]o speaker, however careful, can convey exactly his meaning, or the same meaning, to the different members of an audience,"[22] no speaker can know how the different members of an audience will interpret the intent (*meaning*) of his speech.

How is a speaker to know how the police or prosecutors or courts will *interpret* the intent of his language? They cannot, after all, read his mind. And as the State's repeated description of the intent element of the statute as simply "to harass" shows, the State considers *harass* to include *annoy*, *alarm*, *abuse*, *torment*, and *embarrass*—an interpretation

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[21] *Grayned v. City of Rockford*, 408 U.S. at 108-09.

[22] *Thomas v. Collins*, 323 U.S. 516, 534 (1945).

that is not borne out by common usage as described in dictionaries, and therefore not attributable to the ordinary person.

A restriction criminalizing speech based on the speaker's intent "offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim."[23] *Compelling the speaker to hedge and trim* is a violation of speech's breathing space. This is a functional description of a chilling effect.

The person who does not *intend* to annoy has no way to know that his words will not be misinterpreted.

> In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of … **whatever inference may be drawn as to his intent and meaning**.[24]

Likewise,

> Any effort to distinguish between [discussion and advocacy] based on intent of the speaker or effect of the speech on the listener … would offer no security for free discussion….[25]

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[23] *Thomas v. Collins*, 323 U.S. 516, 535 (1945).

[24] *Buckley v. Valeo*, 424 U.S. 1, 43 (1976) (emphasis added).

[25] *Fed. Election Com'n v. Wisconsin Right To Life, Inc.*, 551 U.S. at 495 (cleaned up).

A defendant who does not have the intent to cause one of the proscribed emotional states, having no way of knowing whether his speech will be misconstrued, will hedge and trim rather than risk prosecution.

Section 42.07(a)(7) is rendered unconstitutionally vague by the gloss applied to section 42.07 in Scott v. State.

Vagueness is about knowing what a statute forbids; overbreadth, about what the statute actually forbids. The vagueness argument is that we can't know whether "the President's tweets [] or an ex-spouse's emails"[26] are prosecutable under the statute. The overbreadth argument is that those communications are in fact prosecutable under the statute, but shouldn't be.

Where category X is unprotected but categories Y and Z are protected, a statute that leaves in doubt whether Y or Z is forbidden is vague. A statute that forbids Y or Z is overbroad. A statute may therefore be both vague and overbroad—it may leave in question whether protected category Y is forbidden while making clear that protected category Z is forbidden.

The vagueness argument is that a person can't know whether sending two emails to a reporter with the intent of causing embarrassment to the

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[26] Opinion Below at 585.

elected DA, if those two emails are reasonably likely to cause such embarrassment, violates the statute. The overbreadth argument is that the person doing so plainly violates the statute, even though this is protected speech.

The two doctrines are intertwined at least in the sense that when a statute such as section 42.07 is overbroad as written, but a court interprets it more narrowly, that interpretation renders the statute violative of the first of the three rules against vagueness, because a person of ordinary intelligence cannot thereafter know from reading the statute what is prohibited.

Contrariwise, if read in the way that any person would interpret it, the statute may not be vague, but it is unconstitutionally overbroad because it forbids a real and substantial amount of protected speech.[27]

This Court in *Scott v. State* held that "in the usual case, persons whose conduct violates § 42.07(a)(4) will not have an intent to engage

[27] The State writes, "A person of ordinary intelligence can complain about the statute's breadth … but he cannot reasonably claim he does not know what is prohibited." State's Brief 27–28. While this correctly reflects the relationship between the two doctrines, of course a person can complain about both..

in the legitimate communication of ideas, opinions, or information."[28] This assertion is supported neither by an accurate understanding of human nature—we are complex beings, with complex motivations, and we often intend not only to offend but also to motivate; not only to embarrass one person but to entertain another; not only to annoy but also to persuade—nor by the language of the statute.

Nevertheless, because this Court has imposed on the statute a "sole intention" limitation that does not exist in the statute's words, a person of ordinary intelligence cannot know what is forbidden. This renders the statute vague.[29]

Section 42.07(a)(7) would be rendered unconstitutionally vague by the gloss the State asks this Court to apply to it.

Likewise, if this Court invites the State's invitation[30] to impose on the statute a "reasonable person" standard that the Legislature did not

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[28] *Scott v. State*, 322 S.W.3d 662, 670 (Tex. Crim. App. 2010), abrogated by *Wilson v. State*, 448 S.W.3d 418 (Tex. Crim. App. 2014).

[29] Not only does the person of normal intelligence not know that "sole intention" is an element of the statute, but the jury eventually hearing such a case will not know either, as there is no mechanism in Texas law for a judicially added element to be included in a jury charge.

[30] State's Brief 26.

include, a person of ordinary intelligence reading section 42.07(a)(7) will not know what is forbidden.[31] A person of ordinary intelligence may be charged with knowledge of the penal statutes, but he is not charged with knowledge of judicial amendments to that statute.

The statute is also unconstitutional because it is overbroad.

The statute restricts a real and substantial amount of protected speech—that is, speech not in any recognized category of historically unprotected speech—based on its content. It is therefore unconstitutionally overbroad under the First Amendment, even if this Court narrows it by adding to it the elements, unwritten by the Legislature, of "sole intent" and "reasonable person."

This issue has been exhaustively briefed in *Nuncio* and *Sanders*, currently before this Court.

The issue is preserved, and this Court should consider it.

This Court reviews "decisions"[32] of courts of appeals. The decision of the court below addressed vagueness and overbreadth.[33]

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[31] Nor will juries.

[32] Tex. R. App. Proc. 66.1.

[33] Opinion Below.

Contrary to the State's argument,[34] the standard of review here is *de novo*,[35] as it was in the Court of Appeals, and not *abuse of discretion*. This Court should review, de novo, the issues decided by the Fort Worth Court of Appeals.

These are issues preserved, albeit inelegantly, by Mr. Barton. In the trial court Mr. Barton pled not only that the statute was vague, but also that the statute is "facially unconstitutional,"[36] and "overly broad and chills the protected speech of the First Amendment [and] is unconstitutional on its face."[37] This put both the trial court and the State on fair notice of both his facial vagueness challenge and his facial overbreadth challenge.

In the Court of Appeals, likewise, Mr. Barton argued that the statute is vague and overbroad, and the State responded to these arguments.[38]

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[34] *Cf.* State's Brief 19.

[35] *Ex parte Lo*, 424 S.W.3d 10, 14 (Tex. Crim. App. 2013).

[36] Clerk's Record (CR) 45.

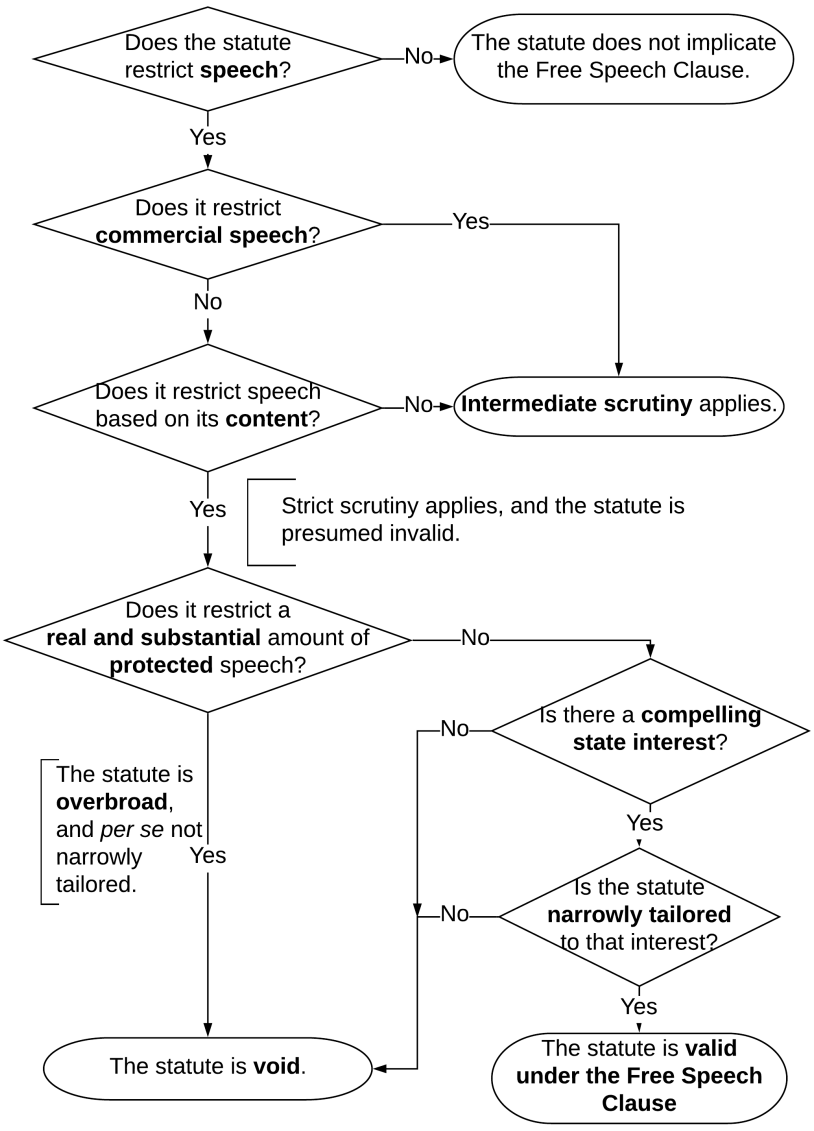
[37] *Id.* 46.

[38] Opinion Below 576–77 and 577 fn.7.

The State here claims that the arguments in cases dealing with the unconstitutionality of statutes are "complex."[39] They are not. Nor are these issues "hard."[40] They are, however, specialized. The fundamentals of overbreadth law are not widely known, but they can be summarized in a one-page flowchart:

[39] State's Brief 19 fn.80.

[40] State's Brief 19.



Whether the State may continue punishing people for their speech under a statute that is facially unconstitutional as written should not depend on the arguments made by the lawyers on *either* side in the trial

court or the intermediate court—lawyers who may not have any special expertise or experience in litigating free-speech issues.

Fortunately, de novo review allows the parties to develop and improve their arguments from the trial court to the intermediate court to this Court, ideally with the goal of providing this Court with better briefing than the lower courts received on legal issues of wide effect such as the constitutionality of statutes.

This Court appears to grant review as a matter of course when intermediate courts hold statutes facially unconstitutional (which is appropriate). It should also grant review as a matter of course when an intermediate court has upheld a statute in the face of a constitutional challenge that this Court has not yet addressed, for more human harm is done by an unreviewed erroneous intermediate-court opinion holding a statute *constitutional* than by an unreviewed erroneous intermediate-court opinion holding a statute unconstitutional.

The mischief done by the continued enforcement of a facially void statute is more than can be undone by this Court's eventual recognition

of the statute's invalidity.[41] Aside from the harm to people who will be punished under a void statute while those litigating the issue hope for this Court to grant review, a facially unconstitutional statute causes ongoing damage to free expression—the chilling of speech[42]—every moment it exists. The constitutionality of a speech-restricting statute is always "an important question of state or federal law."[43] When such an important question "has not been … settled by the Court of Criminal Appeals,"[44] it should be at the first opportunity.

As a matter of policy, this Court should neither allow a valid statute to be held invalid nor allow a void speech-restricting statute to stand once it is called to this Court's attention, even if one side or the other played the game better in the courts below. Once the issue of the constitutionality of a speech-restricting statute is fairly presented to this Court, on a petition in a case in which a court of appeals has rejected a

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[41] This is doubly true if one subscribes to the view expressed by the dissent in *Ex parte Fournier*, 473 S.W.3d 789 (2015), that a conviction obtained by the State under a facially unconstitutional statute might be allowed to stand.

[42] Please see footnote 14, above.

[43] Tex. R. App. Proc. 66.3.

[44] *Id.*

challenge this Court has not yet addressed, this Court should as a matter of prudence review the decision even if the issue has not yet ripened in other courts of appeals.

For the same reasons, once review is granted—the situation that we find ourselves in now—that review should be truly de novo: this Court should consider each party's best arguments for or against the intermediate court's decision, regardless of how well the game was played below. In our adversarial system of justice, individual freedom often depends on which side has the better player of games. Free speech should be insulated from such concerns. This Court should never either uphold or invalidate a statute because some lawyer somewhere along the road to Austin failed to use the magic words.

The statute restricts speech, because speech is about evoking emotions.

The State implies that the "communication" restricted by the statute is not *speech*, claiming that the only communications that are speech are those intended to communicate an idea.

In aid of this idea the State writes, "Each of the types of [unprotected] speech described in *Stevens* has one characteristic the conduct underlying *Scott*'s rationale does not—the intent to

communicate an idea."[45] This is untrue, and if it were true it would be irrelevant.

It is *untrue* because speech in Stevens's unprotected categories of speech is not necessarily intended to communicate an idea. *Obscenity*, for example, is not intended to communicate an idea but to evoke an emotional and physiological effect (arousal or gratification). *Fraud* is not intended to communicate an idea but to deprive another of assets. *Incitement* is not intended to communicate an idea but to rouse to action. *Fighting words* are intended to evoke anger and rouse to violent action.

The State's untrue assertion is irrelevant, however, because *Stevens*'s list of *unprotected* categories of speech is, by definition, not an exhaustive list of all categories of speech. Not all communication is intended to communicate an idea or a fact. Some communication is intended to inspire, to rouse to action, or to persuade. Some communication is intended to do none of those things, but only to evoke an emotion, and it is no less protected speech for lacking the intent to communicate an articulable idea.

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[45] State's Brief 32.

If the law were so simple as "conduct with no intent to convey an idea is not speech," then courts could simply say, "there is no idea communicated by pornography, so it is not speech," and state restrictions on pornography short of obscenity would face only intermediate scrutiny.[46] Courts cannot do this.

What makes speech *speech* is not the time, manner, or place in which it is uttered; what makes speech *speech* is

> whether "an intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.[47]

But the *message* conveyed by speech is not, as the State seems to think,[48] necessarily something that can be reduced to words.

The Supreme Court in *Cohen v. California* rejected the notion that speech must, to receive First Amendment protection, communicate *an idea*:

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[46] To the contrary, "[s]exual expression which is indecent but not obscene is protected by the First Amendment," and restrictions thereon face strict scrutiny. *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989).

[47] *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (cleaned up).

[48] State's Brief 35–36.

> [W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech[,] has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated.[49]

The thing that makes conduct *speech*, then, may be its cognitive force—its intent and ability to convey a fact or an idea,[50] for example—or its emotive force—its purpose and function to evoke an emotional state.[51] In the words of the Second Court of Appeals, "Protected speech may communicate, among other things, ideas, emotions, or thoughts."[52]

To claim that speech is "noncommunicative" because it evokes emotions, even negative ones, in the hearer of the speech is nonsensical: one of the things that *makes* sounds, images, and words communicative is their purpose of calling forth an emotional state in the listener. At

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[49] *Cohen v. California*, 403 U.S. at 26.

[50] Provided, of course, that the likelihood was great that the message would be understood by those who received it—the statute's "reasonably likely" element.

[51] Mr. Barton does not pretend that this list is exclusive—communication may be a prompt (for example, *What other purpose does a question in a footnote serve?*), a signal of something unstated, or persuasion, which involves a combination of cognitive (λόγος), emotive (πᾰ́θος), and signalling (ἦθος) functions.

[52] *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 448 fn.19 (2d Cir. 2001).

least since the time of Aristotle, philosophers have recognized πάθος, *pathos*, as a mode of persuasion.

Some speech—a textbook, perhaps—has only cognitive content. It communicates ideas and thoughts, but it is not intended to invoke emotions.

Other speech—the genre of historical fiction, for example—has both cognitive and emotive content. It communicates ideas and thoughts, and also is intended to evoke emotions.

Still other speech, however, has content that is only emotive. Such speech is not intended to communicate ideas or thoughts, opinions or information, nor to persuade, but *only* to evoke emotions. A horror story, for example, is not intended to communicate a fact or an idea, but to frighten—to *alarm*. Pornographic erotica are not intended to communicate a fact or an idea, but to arouse.[53] Tchaikovsky did not write his Third Symphony to communicate some idea or thought that could be reduced to words, but only to make listeners *feel*.

Horror stories and erotica and music are protected by the First Amendment not because they present any particular topic, idea,

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[53] We know that the intent to arouse or gratify the emotion of sexual desire does not render speech unprotected. *Ex parte Lo,* 424 S.W.3d0 (Tex. Crim. App. 2013).

viewpoint, or message but because[54] they are intended to evoke those effects.

Because, in other words, of their communicative intent.[55]

"Pure speech includes written and spoken words, as well as other media such as paintings, music, and film 'that predominantly serve to express thoughts, emotions, or ideas.'"[56] Or, as Justice White wrote in 1991,

> It is only because nude dancing performances may generate emotions and feelings of eroticism and sensuality among the spectators that the State seeks to regulate such expressive activity, apparently on the assumption that creating or emphasizing such thoughts and ideas in the minds of the spectators may lead to increased prostitution and the degradation of women. But generating **thoughts, ideas, and emotions** is the essence of communication.[57]

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[54] And not despite the fact.

[55] The 20th-century philosopher Martin Heidegger wrote that fine art does not display beauty or truth in itself, but instead "brings forth the beautiful" by means of illuminating what is true in a work of art, in a way more fundamental than linguistic expression could ever hope to capture. *See* Heidegger, Martin. "The Origin of the Work of Art," trans. Berkowitz, Roger & Philippe Noret, Bard College, 2006.

[56] *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890 (Ariz. 2019).

[57] *Barnes v. Glen Theatre, Inc.*, 501 U.S 560, 592–93 (1991) (White, J., dissenting) (emphasis added).

While this was said in dissent, it cannot be gainsaid that *generating thoughts, ideas, and emotions* is the essence of communication, and conduct that is specifically intended to generate emotions—even what we might consider unpleasant or unwelcome emotions—is, by virtue of that intent, speech.

When speech is intended to generate thoughts, the generation of thoughts is its *message*. When speech is intended to generate emotions, the generation of emotions is its message.

Here, it is by virtue of the emotive force, function, and purpose of Mr. Barton's speech that the State seeks to regulate it. The State alleges that Mr. Barton's "conduct" is not protected speech because of his emotive intent—to generate feelings in the complainant—which is *the very thing that makes it expressive*.[58]

If a statute provided, *it is an offense to engage in repeated conduct intended to evoke joy or lust or laughter*, it would be readily recognized as an overbroad content-based restriction on communication. There the emotions are generally considered positive, but communication is no

[58] The intent to evoke one specific emotion, *the fear of unlawful violence*, may render some expressive conduct unprotected. *Virginia v. Black*, 538 U.S. 343, 360 (2003). This principle is not generalizable to all negative emotions, many of which are part of daily life in a way that fear of unlawful violence is not.

less protected because the emotion it is intended to evoke is perceived as negative.[59] Just as it is a normal part of human life to arouse and feel joy and lust and laughter, it is a normal part of human life to annoy and embarrass and alarm each other, and sometimes to abuse, torment, and harass each other. And just as the intent to arouse joy or lust or laughter does not render speech unprotected, neither does the intent to harass, annoy, alarm, abuse, torment, or embarrass.

The State gives the specific example of "spray-paint[ing] a swastika just for shock value."[60] That's a terrific counterexample to the State's argument, for the Supreme Court has already addressed a law restricting the display of a swastika "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" as an unconstitutional content-based restriction of speech.[61]

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[59] "[W]hen the intent is something that, if accomplished, would constitute protected expression, such an intent cannot remove from the ambit of the First Amendment conduct that is otherwise protected expression." *Ex parte Thompson*, 442 S.W.3d 325, 338 (Tex. Crim. App. 2014).

[60] State's Brief 32.

[61] *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 380 (1992).

A RESTRICTION BASED ON THE EMOTIVE PURPOSE OF SPEECH IS CONTENT BASED.

We might debate whether a restriction on speech "intended to keep people awake" or "intended to disrupt a public meeting" is in fact a content-based restriction because it restricts speech based on its "purpose." But *Reed v. Town of Gilbert*'s statement that a restriction is content based if it restricts speech based on its "function or purpose"[62] certainly holds true where the restricted purpose is a core function of communication—for example, *to persuade*, *to convey information*, or, as here, *to evoke emotion*.[63]

The court below noted, "Barton did not argue to the trial court and does not argue before this court that section 42.07(a)(7) constitutes a content-based restriction on speech."[64]

But Mr. Barton argued in the trial court that the statute was "overly broad," and part of the overbreadth argument is necessarily that the statute is content based. Restrictions are either content based or content neutral; there is no third option. To say that a content-neutral statute is

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[62] *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. at 2227.

[63] Please see the discussion above at 20.

[64] *Opinion Below* at 566 fn.5.

facially overbroad makes no sense: content-neutral statutes *by definition* restrict protected and unprotected speech equally. A content-neutral restriction restricts a real and substantial amount of protected speech in relation to the unprotected speech it captures because it captures all content indiscriminately.

Because section 42.07(a)(7) restricts speech based on its *emotive* function and purpose, it is a content-based restriction on speech. A statute cannot restrict speech by its intended and reasonably likely emotional effect without restricting it by content.

The State misrelies on Ward.

Ward v. Rock Against Racism's framework "applies only if a statute is content neutral. Its rules thus operate to protect speech, not to restrict it."[65] Strict scrutiny applies "either when a law is content based on its face or when the purpose and justification for the law are content based."[66] Here we have a restriction that is content-based *on its face*—

[65] *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2229 (2015).

[66] *Id.* at 2228.

section 42.07(a)(7) defines regulated speech by its "reasonably likely" emotive "function" and its emotive "purpose."[67]

Further, section 42.07(a)(7)'s restriction is justified by the emotional effect that the restricted speech might have on the complainant, and not "without reference to the content of the regulated speech."[68] This too renders the restriction content based.

The State likewise misrelies on City of Renton v. Playtime Theatres.

From its *Ward* argument, the State turns to a "secondary effects" argument. Secondary-effects doctrine is not a new idea; it has been around for more than 30 years. In that time the Supreme Court has never applied the doctrine to uphold any statute outside the context of regulation of brick-and-mortar sexually oriented businesses.

The State cites four cases in which it claims that the Supreme Court has "considered or applied" secondary-effects doctrine. In one of those cases, *City of Renton v. Playtime Theatres*,[69] the Court applied the doctrine to uphold a zoning ordinance. In two cases the Court explicitly

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[67] *Id.* at 2227.

[68] Cf. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)

[69] *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986).

rejected the application of secondary-effects doctrine.[70] In the last case—the only one of the four post *Stevens*—only the dissent even mentioned the doctrine.[71]

The gist of the secondary-effects doctrine is that content-neutral *justifications* may save a law regulating sexually oriented businesses from strict scrutiny; while *Reed* does not explicitly overrule the secondary-effects cases, it does say that "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech."[72] This Court need not decide whether with *Reed v. Town of Gilbert* the Court "shot a missile" into its own secondary-effects reasoning,[73] though, because the

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[70] *Boos v. Barry*, 485 U.S. 312 (1988); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997). In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430 (1993), the Court likewise considered and rejected applying secondary-effects doctrine outside the context of sexually oriented business zoning.

[71] *McCullen v. Coakley*, 134 S. Ct. 2518 (2014).

[72] *Reed v. Town of Gilbert*, Ariz., 135 S. Ct. 2218, 2228 (2015).

[73] Leslie Gielow Jacobs, *Making Sense of Secondary Effects Analysis After Reed v. Town of Gilbert*, 57 Santa Clara L.R. 385, 386 (2017)

Supreme Court has never even arguably applied secondary-effects doctrine to a penal statute like section 42.07.

While the State is desperately enamored of "secondary effects" as a catch-all argument for punishing speech that the state dislikes,[74] a complainant's intended and likely emotional reaction (offense, embarrassment, and so forth) is decidedly *not* a "secondary effect" of speech. "Listeners' reactions to speech are not the type of 'secondary effects' we referred to in *Renton*. … The emotive impact of speech on its audience is not a 'secondary effect.'"[75] Secondary effects are effects that "have nothing to do with content."[76] It cannot be said that the annoyance and embarrassment that section 42.07(a)(7) is intended to address "has nothing to do with content."[77]

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[74] See, for example, State's Brief in *Ex parte Jones*, No. PD-0552-18, at 7–9; State's Brief in *Ex parte Nuncio*, No. PD-0478-19, at 33.

[75] *Boos v. Barry*, 485 U.S. at 321. Five of eight justices agreed expressly with this proposition.

[76] *Id.* at 320.

[77] This is especially true if this Court reads a "sole intent" element into the statute—the sole intent of a series of electronic communications can never be determined without analyzing the content of the communications.

Section 42.07(a)(7) does not only restrict speech based on *listeners*' intended-and-likely emotional reactions; it restricts repeated communications by one person to another with the intent of embarrassing or offending a third person.[78] But the effects of speech on its subjects, like its effects on listeners, are not "secondary effects."[79]

Secondary-effects doctrine, here, is a red herring. The State cannot restrict speech based on its content, and then claim the benefit of intermediate scrutiny by proclaiming the harm done by the speech "secondary."

The statute does not limit its restriction to speech with no idea or message.

The State writes, "If, as this Court held in *Scott*, a person has no idea or message behind their intentionally harassing, reasonably-likely-to-

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[78] A communicates repeatedly with B with the intention of causing embarrassment to C—for example, C's paramour's husband A emails C's wife A twice about the affair that C is having with A's wife.

[79] See *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815 (2000) ("lesser scrutiny afforded regulations targeting the secondary effects of crime or declining property values has no application to content-based regulations targeting the primary effects of protected speech"). If speech's effect on its *subjects* were "secondary effects," defamation law would be much broader.

harass words, there is no reason to treat it as anything other than noise, let alone to apply strict scrutiny."[80]

But "no idea or message" is false for two reasons: first, because the statute does not limit itself to speech, the *sole* intent of which is to cause an emotional effect; and second, because the emotive content of speech—the very intent to cause its listeners to feel something—is its *message*.

States are split over the issue.

The harassment statutes at issue in the cases cited by the State[81] are all materially distinguishable from section 42.07.

The high courts of Colorado, New York, Illinois, and Minnesota, however, have all rejected criminal-harassment statutes that required the same intent as the Texas statute and prohibited the same actions as section 42.07.[82] The high court of each state held that the statute before it was unconstitutionally overbroad because it would sweep in a

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[80] State's Brief 37.

[81] State's Brief 13 fn.58.

[82] *See* COLO. REV. STAT. § 18-9-111(1)(e) (1973); N.Y. PENAL LAW § 240.30 (2012); 38 Ill. Comp. Stat. § 26-1(a)(2) (1973); Minn. Stat. § 609.749, subd. 2(6) (2018).

substantial amount of protected speech relative to unprotected speech or conduct.[83]

A number of state intermediate courts of appeals have also struck statutes similar to section 42.07 as unconstitutionally overbroad.[84]

Conclusion.

The *message* of speech, its *communicative content*, may be something that cannot be reduced to words, but is purely emotive. The emotive content of speech includes at the very least the emotions that it is *intended* and *reasonably likely* to evoke. Recognizing that fact has at least two effects in this case.

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[83] *See People v. Golb*, 15 N.E.3d 805, 813-14 (N.Y. 2014); *Bolles v. People*, 541 P.2d 80, 83-84 (Colo. 1975); *People v. Klick*, 362 N.E.2d 329, 331-32 (Ill. 1977); *Matter of Welfare of A.J.B.*, 929 N.W.2d 840 (Minn. 2019)

[84] *See, e.g.*, *Provo City v. Whatcott*, 1 P.3d 1113, 1115-16 (Utah Ct. App. 2000) (holding unconstitutional a statute that prohibited making phone calls "with intent to annoy, alarm another, intimidate, offend, abuse, threaten, harass, or frighten"); *City of Everett v. Moore*, 683 P.2d 617, 618, 620 (Wash. Ct. App. 1984) (holding unconstitutional a municipal statute that prohibited communications "by telephone, mail or other form of written communication, in a manner likely to cause annoyance or alarm" when made "with intent to harass, annoy or alarm another person"); *State v. Dronso*, 279 N.W.2d 710, 711 n.1, 714 (Wis. Ct. App. 1979) (holding unconstitutional a statute that prohibited making a telephone call with "intent to annoy another").

First, communication cannot become not-speech because its purpose is purely emotive, so that section 42.07, by restricting "communications," restricts speech.

And second, section 42.07's restriction is a content-based restriction.

The position that this Court took in *Scott*, and that the State takes here—that conduct intended to evoke an emotional effect is not speech—is dangerous. If that position were to hold, then the State could restrict any speech based on the speaker's intent to evoke an emotion, from *alarm* to *lust*,[85] from *joy* to *hatred of Big Brother*,[86] and the restriction would have to pass only intermediate scrutiny.

Prayer

For those reasons, please affirm the judgment of the Fort Worth Court of Appeals and remand this case with instructions that the information be dismissed.

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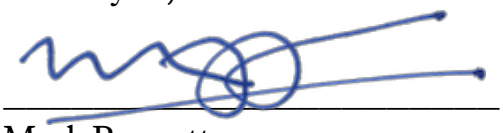
[85] *A person commits an offense if, with intent to arouse or gratify the sexual desire of another, the person sends repeated electronic communications in a manner reasonably likely to arouse or gratify the sexual desire of another.*

[86] *A person commits an offense if, with intent to cause another to hate Big Brother, the person sends repeated electronic communications in a manner reasonably likely to cause hatred of Big Brother.*

Thank you,



Mark Bennett
SBN 00792970
Bennett & Bennett
917 Franklin Street, Fourth Floor
Houston, Texas 77002
713.224.1747
mb@ivi3.com

Lane A. Haygood
SBN 24066670
lane@haygoodlawfirm.com
522 North Grant Avenue
Odessa, Texas 79761
432.337.8514

Tobias Xavier Lopez
SBN 24089233
1319 Ballinger Street
Fort Worth, Texas 76102
817.335.0200
Lead Counsel for Respondent

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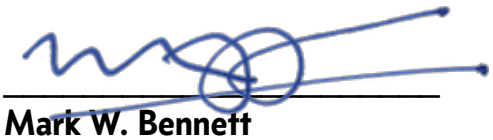

Mark W. Bennett
Attorney for Appellant